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# "Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents

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“SUFFICIENT” CAPACITY: THE CONTRASTING CAPACITY  
REQUIREMENTS FOR DIFFERENT DOCUMENTS

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## I. INTRODUCTION

In Anglo-American law, the concept of mental “capacity” is used to measure the degree to which an individual has the “mental ability to understand the nature and effects of one’s acts”<sup>1</sup> as determined by a medical or cognitive assessment of an individual’s mental ability. Based on an individual’s mental capacity, the law decides whether the individual had sufficient capacity to engage in the action in question. The legal concept of mental capacity, therefore, is the basis for “when a state legitimately may take action to limit an individual’s rights to make decisions about his or her own person or property.”<sup>2</sup> Different actions require different levels of mental capacity.

The more complex the act or decision, the greater the level of capacity required; the requisite level of capacity varies with the situation.<sup>3</sup> The required degree of legal capacity can be thought of as existing on a spectrum so that the legal capacity sufficient to perform certain acts may be considered insufficient to perform others. For example, the legal capacity required to make a will (“testamentary capacity”) is lower than that required to enter into a valid contract.<sup>4</sup> Consequently, in many jurisdictions, even though an individual has been found to lack the capacity to contract, the individual may still be found to have the requisite capacity to make a valid will.<sup>5</sup>

This article discusses the levels of capacity required to undertake a variety of legal acts, including executing valid wills, trusts, gifts, powers of attorney and contracts. This article also explores a doctrine that is closely related to the determination of testamentary capacity, the doctrine of “undue influence.” Undue influence lies in the shadow land between testamentary capacity and the capacity to contract and is used by probate courts to invalidate the will of an individual whose capacity level is high enough for testamentary capacity, but too low to enable the testator to resist the importuning of another.

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1. *Black’s Law Dictionary* 220 (8th ed. 2004).
  2. Charles P. Sabatino, *Competency: Refining Our Legal Fictions*, Older Adults’ Decision-Making and the Law 3 (Michael Smye, K. Warner Schaie & Marshall B. Kapp eds. 1996).
  3. One commentator has pointed out that “. . . our legal system has always recognized situation-specific standards of competency that depend on the specific event or transaction in question—such as capacity to make a will, marry, enter into a contract, vote, drive a car, stand trial in a criminal prosecution and so on.” Sabatino, *supra* n. 2, at 4.
  4. Warren F. Gorman, M.D., *Testamentary Capacity in Alzheimer’s Disease*, 4 Elder L. J. 225, 233 (1996); Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 Temp. Pol. & Civ. Rts. L. Rev. 321, 322 (2003). In *the Matter of the Estate of Albert Goldberg*, 582 N.Y.S.2d 617, 620 (N.Y. Sur. Ct. 1992) (stating, “It is hornbook law that less mental capacity is required to execute a will than any other legal instrument.”).
  5. *In re Anderson*, 246 N.W.2d 586, 587-88 (Neb. 1976); *In re Aageson*, 702 P.2d 338 (Mont. 1985).

## II. CAPACITY TO EXECUTE A VALID WILL

### A. Mental Capacity, Wills and Autonomy

The validity of a will can be challenged on a variety of grounds, including mistake in the execution,<sup>6</sup> fraud,<sup>7</sup> and duress.<sup>8</sup> But by far the most prevalent and most successful way to challenge a will is to claim that the testator lacked sufficient capacity,<sup>9</sup> because only individuals with "testamentary capacity" can legally execute a valid will.<sup>10</sup> If legal capacity lies along a spectrum, testamentary capacity is at the lower end. Consequently, because of the relatively low level of capacity needed to execute a valid will, most claims of testamentary incapacity fail. The law's liberal definition of testamentary capacity is central to the concept of "freedom of testation," which means simply that testators should be free to dispose of their property however and to whomever they wish.<sup>11</sup> It is valued in the Anglo-American system of law for a number of reasons, including the belief that individual autonomy should extend to controlling the post-mortem distribution of the individual's property. Some also believe that the knowledge by testators that they will be able to dispose of their property at their deaths to whomever they choose encourages individuals to be productive and accumulate wealth.<sup>12</sup> Additionally, the understanding by family members that the testator is free to dispose of property to any or none of them is thought to encourage increased loyalty and devotion by family members and to discourage the family from abandoning an aging testator in need of their concern and care.<sup>13</sup>

Of course, testamentary capacity alone is not sufficient. The will or the gift made by the will also must not be the result of undue influence. The requirement that a testator have testamentary capacity and be free of undue influence protects the testator and, secondarily, the testator's family. If a testator is found either to have lacked testamentary capacity or to have suffered from undue influence, the will is invalid and

6. *In re Estate of Dye*, 92 Cal. App. 4th 966 (Cal. Ct. App. 2001).

7. *Rood v. Newberg*, 733 N.E.2d 126 (Mass. App. Ct. 1999).

8. Cal. Prob. Code § 6104 (2005).

9. See Lawrence A. Frolik, *The Biological Roots of Undue Influence: What's Love Got to Do With It?*, 57 U. Pitt.L. Rev. 841, 848 (1996); Gary A. Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 Case W. Res. L. Rev. 275, 283 (1999); John C. Welsh, *Estates and Trusts*, 49 Syracuse L. Rev. 473, 483 (1998). Professor Schoenblum found that "undue influence and lack of testamentary capacity accounted for the exclusive grounds of contest in 39 of 60 cases in which the allegations could be determined." Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 Real Prop. Prob. & Tr. J. 607, 647–50 (1987).

10. Every state has a statute that requires a testator to have testamentary capacity in order to make a valid will. The vast majority of these statutes require the testator to be "of sound mind." See Unif. Prob. Code § 2–501 (2004). For a list of state statutes that require a testator to be "of sound mind," see Reporter's Note, *Restatement (Third) of Property: Wills & Donative Transfers* § 8.1 (2003).

11. See Gorman, *supra* n. 4, at 532.

12. Pamela R. Champine, *A Sanist Will?* 19 N.Y.L. Sch. J. Hum. Rts. 177, 181 (2003).

13. *Id.*

the property passes by intestacy, or a former will becomes the valid will dictating how the testator's property will be distributed. Obviously, intestacy favors the family,<sup>14</sup> and, in most cases, the revival of a former will also favors the family. Alternatively, the will may be valid, but the undue influence may invalidate the gift to the person responsible for the undue influence.<sup>15</sup> Should that occur, the gift will pass by the residuary clause of the will. Here again family members are often the beneficiaries of the residue. If not favored, the family will have no reason to dispute the will or a gift thereunder, as it is axiomatic that those who benefit by the invalidation of the will or a gift thereunder are those who challenge its validity.

### *B. Age and Other Status Requirements for Testamentary Capacity*

The issue of testamentary capacity is not one that is unique to modern law; it has ancient roots.<sup>16</sup> In the past, age and the individual's status were considered relevant in the determination of whether an individual had testamentary capacity. In modern times, while age is still a component of capacity, requirements relating to status have yielded to a general requirement as to the testator's state of mind.

Age, or perhaps an ageist attitude, often appears in the law as a component of a determination of capacity, both for the execution of wills and for entering into a contract.<sup>17</sup> For many years, the age of majority throughout the United States was age 21, and, in many jurisdictions, that was also the age required for an individual to make a valid will.<sup>18</sup> Due to the almost universal reduction of the age of majority to age 18, the Uniform Probate Code and most state laws now provide that an individual who is under the age of 18 is *per se* incapable of writing a valid will.<sup>19</sup> Of course, this requirement is based solely on chronological age, which may have little connection with an individual's "mental age" or maturity. At the other end of the age spectrum, advanced age, in and of itself, is not a bar to testamentary capacity, though certainly the older the testator, the more likely that he or she may suffer from diminished capacity and so lack testamentary capacity.

Factors other than age have historically played a role in the determination of whether an individual could execute a valid will. Married women were once deemed to be unable to own property and to possess the legal capacity necessary to perform a

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14. A typical intestacy scheme will divide the decedent's property among the decedent's spouse, children and other descendants; parents; siblings and the descendants of siblings; grandparents and the descendants of grandparents. See Unif. Prob. Code § 2-103 (1990).

15. *Restatement (Third) of Property: Wills & Donative Transfers* § 8.1 cmt. b (2003); *Burke v. Burke*, 801 S.W.2d at 693 (Ky. Ct. App. 1990); Ray D. Madoff, *Unmasking Undue Influence*, 81 Minn. L. Rev. 571, 575 (1997).

16. See Eugene L. Ross & Thomas J. Reed, *Will Contests* § 2:4 (2d ed.1999) for a discussion of the historical development of the law relating to testamentary capacity and undue influence.

17. For example, in most states, contracts made by those who have not reached the age of majority are void or voidable by the minor. See e.g., GA. Code Ann. § 13-3-20 (2003).

18. Madoff, *supra* n. 15, at 611.

19. Unif. Prob. Code § 2-501 (2004). One noteworthy exception is Georgia where the minimum age to write a valid will is 14. GA. Code Ann. § 53-4-10 (2005).

variety of transactions, including making a valid will.<sup>20</sup> Criminals, captives, and indentured servants were also deemed to lack testamentary capacity.<sup>21</sup> Other past *per se* bars to testamentary capacity include impairments in sight, hearing or speech, habitual drunkenness or drug addiction, insanity, "idiocy," and illiteracy.<sup>22</sup> In some jurisdictions, individuals who were found to be "immoral" could not make valid wills.<sup>23</sup> Today it is rare to find such conditions in state testamentary statutes, though some historical concepts and attitudes about mental incapacity live on in the current requirements relating to the testator's state of mind.

### C. *The Modern View of Testamentary Capacity*

Most modern state statutes merely require that an individual be "of sound mind" in order to make a valid will. Some statutes go further and contrast the capacity to make a will with the capacity to enter into a valid contract, which is usually deemed to be a higher level of capacity.<sup>24</sup> But generally the statutes offer little by way of illustration as to what type of mental state constitutes "testamentary capacity."

The common law test for testamentary capacity was laid out in 1790 in *Greenwood v. Greenwood*<sup>25</sup> and refined in 1840 in *Harwood v. Baker*.<sup>26</sup> Since that time, the *Greenwood-Baker* test has served as the template for virtually every court determination of testamentary capacity.<sup>27</sup> The common law test has four elements:

1. Did the testator understand the nature of the act he or she was performing?
2. Did the testator know the nature and extent of his or her property?
3. Did the testator know the identity of those who were the "natural objects of his or her bounty"?
4. Did the testator understand the will's disposition of his or her property?

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20. See Mary F. Radford, *Wills and Administration in Georgia* § 4.1, at 55 (6th ed.) (The Harrison Company 2000).

21. *Id.* at 55.

22. See James B. McLaughlin & Richard T. Boswer, *Wiggins: Wills & Administration of Estates in North Carolina* (14th ed.) (The Harrison Company 2000); Ross & Reed, *supra* n. 16, at § 2-9. The Georgia Code currently provides that "an insane individual may not make a will except during a lucid interval." GA. Code Ann. § 53-4-11(c); Radford, *supra* n. 20, at § 4.3 60-61, § 41 and § 4.1 55; Ross & Reed, *supra* n. 16, at § 2:4.

23. See discussions at James R. Merritt, 1 *KY. Practice: Prob. Practice & Procedure* § 377 (2d ed. 1984); Radford, *supra* n. 20, at § 4.2 58.

24. Compare GA. Code Ann. § 53-4-11(b) ("An incapacity to contract may coexist with the capacity to make a will.") with D.C. Code 18-102 ("A will, testament, or codicil is not valid for any purpose unless the person making it is at least 18 years of age and, at the time of executing or acknowledging it as provided by this chapter, of sound and disposing mind and capable of executing a valid deed or contract.").

25. *Greenwood v. Greenwood*, 163 Eng. Rep. 930 (1790) (Eng.).

26. *Harwood v. Baker*, 13 Eng. Rep. 117 (1840) (Eng.).

27. See Frolik, *supra* n. 9, at 849-50.

The four elements make it clear that the common law test focuses not on the age or the physical or mental condition of the individual, but rather on the individual's decision-making ability.

Although at first glance the elements of the common law test appear simple, their application raises many questions. For example, to satisfy element number one, does the individual have to know the difference between a will and intestacy or is it enough that the individual understands that a will distributes his or her property upon death?<sup>28</sup> To meet the second element, what degree of detail must the testator know about his or her assets?<sup>29</sup> Must the testator know the exact makeup of his or her stock portfolio or the precise location of every item of real estate? What if the testator has little or no education and no comprehension of the extent of his or her financial holdings, but knows exactly which items of furniture and jewelry should go to which relative? Under element number three, must the testator know the identity of those whom the intestacy laws deem to be the "natural objects of his or her bounty"? Must the testator be able to name every single one of his or her grandchildren or great-grandchildren? Finally to meet the fourth element, to what extent must the testator be familiar with the effect of generation-skipping trusts, QTIP trusts, charitable remainder trusts, and the amalgam of complex estate planning mechanisms recommended by the lawyer?

Phrased differently, is the common law test of testamentary capacity static and rigidly adhered to in every individual's situation or is it flexible depending upon the individual's life circumstances, the size and complexity of an individual's estate, and the individual's plan for the disposition of his or her property? Is a once-married, long-term spouse who wants to leave her modest estate to her surviving spouse in trust and then to her children held to the same standard as a thrice-married, 80-year-old bachelor who chooses to disinherit his children and bequeaths his multi-million dollar estate to his new 25-year-old girlfriend? Should an individual who has only a few material possessions, but knows exactly to whom those possessions should go, be held to the same standard as an individual whose lawyer has helped him to set up a family limited partnership, a qualified personal residence trust, and a trust to avoid the generation-skipping transfer tax? Should a weak, frail, disabled 80-year-old who is addicted to painkillers be held to the same standard as a healthy young stockbroker who just made his first million? The simple answer to these questions is that if a testator's testamentary capacity is challenged the fact-finder will be faced with making a determination based not on any single fact or one element of the common law test, but on the totality of the circumstances as to the mental state of the testator at the time of the execution of the will.<sup>30</sup>

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28. John B. Huffaker & Michael B. Novakovic, *How to Determine If A Client Has Testamentary Capacity*, 21 Est. Plan. 323, 326 (Nov./Dec. 1994).

29. *Id.*

30. Gorman, *supra* n. 4, at 225, 233.

#### D. Proving Testamentary Capacity

Proof of testamentary capacity is a component of every proceeding for the probate of a will.<sup>31</sup> The inherent vagueness of the testamentary capacity requirement leaves much of the determination of capacity in the hands of the fact-finder. The propounder of the will has the initial burden of proving that the testator had the capacity to make the will, but this burden is not difficult because in most jurisdictions the testator is presumed to have had testamentary capacity.<sup>32</sup> If capacity is challenged or undue influence is claimed (in the form of a "will contest" or "caveat"), the burden shifts to the one challenging the will to prove lack of testamentary capacity or undue influence. The evidence offered in these cases is by its very nature circumstantial and often consists of "the usual mish-mash of lay opinions, medical reports, and hypothetical expertise."<sup>33</sup>

The testator must have testamentary capacity at the time of the execution of the will.<sup>34</sup> Even if the testator was mentally incapacitated at other times, the will is valid if the testator had capacity at the moment when he or she signed the will. Known as the "moment of lucidity,"<sup>35</sup> this concept puts great weight on the testimony of those who observed the testator at the time of the will signing. Thus, the witnesses to the will and others present at the time the will was executed are the best source of information as to the testator's state of mind.<sup>36</sup> The more remote the evidence is from the time of the will execution, the less likely it is to be given credence or even to be admissible.<sup>37</sup> Because the testimony of the attesting witnesses is rarely enough to resolve a testamentary capacity question, however, both the propounder and the challenger

31. "Probate" (from the Latin *probare*—"to prove") is the process of proving in front of the appropriate judicial authority that the proffered will is in fact the will of the testator. The sole issue in a probate proceeding is *devisavit vel non*—was this, or was it not, the testator's will? A will is not valid to pass title to property unless it has been admitted to probate. In a typical probate proceeding, the person who is offering the will for probate (the "propounder" or "proponent") must make out a *prima facie* case that the will was properly executed and that the testator had testamentary capacity.
32. *Franklin v. First National Bank*, 200 S.E. 679, 682 (1938). See also, *Thompson v. Davitte*, 59 Ga. 472, 475 (1877) (stating, "The truth is, that what the propounders have to carry, on the score of sanity and freedom, is more in the nature of ballast than of cargo. It is just burden enough to sail with—no more."). See also, *Evans v. Arnold*, 52 Ga. 169, 181 (1874) (stating, "Undoubtedly sanity is the normal condition of man, and if, on an examination of the circumstances attending the execution nothing unusual appear; if the testator appears to be aware of what he is doing, and acts as sane men do, I am of the opinion that a *prima facie* case is made out, at least that a verdict for the will would be justified, if, when the facts are detailed, the act as done is done as sane men do things—as if a man ask a witness to attest his will, and the witness do so on its being signed by the testator—the very act of signing, intelligently, is a sane act." ).
33. Ross & Reed, *supra* n. 16, at § 6.6.
34. See *Estate of James Henry Mask*, 703 So. 2d 852, 856 (Miss. 1997). See discussion at Radford, *supra* n. 20 at § 4–5 64–65.
35. See Gorman, *supra* n. 4, at 234; *Daley v. Boroughs*, 835 S.W.2d 858, 864 (Ark. 1992).
36. See Gorman, *supra* n. 4, at 234.
37. See *Daley*, 835 S.W.2d at 838; *Caudill v. Smith*, 450 S.E.2d 8, 12 (N.C. Ct. App. 1994) (stating, "Evidence of his mental condition before the critical time is admissible, if it is not too remote to justify an inference that the same condition existed at the latter time.").



typically resort to a variety of other types of evidence, including medical experts, psychologists, medical reports and other forensic evidence.

Neither lay nor expert witnesses may testify as to whether the testator had the legal capacity necessary to make a will, as this is a legal conclusion rather than a question of fact.<sup>38</sup> However, any witness is allowed to give an opinion as to the mental state of the testator. A lay witness must state the facts on which the opinion is based.<sup>39</sup> An expert witness such as a physician, a psychiatrist or other professional may give an opinion without laying a factual basis, but typically an expert will lay out the circumstances that led to his or her opinion.<sup>40</sup> An expert can also rely on forensic evidence in the form of various tests administered to the testator during life and at or around the time of the will execution.

Although the conclusion concerning testamentary capacity is a legal determination, the facts presented to the judge or jury in a testamentary capacity case often determine whether the will is admitted to probate. For example, although not technically “evidence” in a testamentary capacity case, the testator’s choice as to the disposition of the estate often convinces the judge or jury that the testator lacked or had diminished capacity or that he or she was unduly influenced.<sup>41</sup> The fact-finders evaluate the testamentary scheme from a variety of angles. Apparently applying their personal set of values, the fact-finders appraise whether the chosen scheme is one that a “normal” individual would choose.<sup>42</sup> It should come as no surprise that fact-finders typically do not favor a disposition that contravenes the norm (e.g., leaving one’s estate to a same-sex partner as opposed to one’s children). Similarly, a deviation from a long-held testamentary scheme (e.g., testator changes her will from one that benefits her children to one that favors her new boyfriend) seems to influence the decision of the fact-finders.<sup>43</sup>

A final form of evidence that arises in the context of a will challenge is when the testator, prior to or shortly after executing the will, has been found by a court to be incapacitated and in need of a guardian or conservator. Interestingly, such an

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38. *Page v. Beach*, 95 N.W. 981 (Mich. 1903).

39. An example of the types of facts to which lay witnesses may attest appears in *Estate of Long*, 575 N.W.2d 254, 258 (S.D. 1998). In this case, there was also testimony from Paul’s granddaughters that he did not remember or recognize them in May of 1996. There was testimony from Shirley Holt who managed the hotel Paul lived in for twenty years that he was confused and that he had gotten worse in the last few years. Also, Paul’s long-time acquaintance, Sheriff Mike Demery, testified that Paul did not know who Demery was on different occasions and that Paul would become confused.

40. The opinion of expert witness may be challenged on *Daubert* grounds (i.e., it is based on bad science); see Lawrence A. Frolik, *Science, Common Sense, and the Determination of Mental Capacity*, 5 Psychol. Pub. Pol’y & L. 41 (1999).

41. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 Ariz. L. Rev. 235, 236-37 (1996).

42. Mary Louise Fellows, *In Search of Donative Intent*, 73 Iowa L. Rev. 611, 613 (1988).

43. See generally Spitko, *supra* n. 9.

adjudication in most jurisdictions does not bar the individual from making a valid will.<sup>44</sup>

### III. CAPACITY TO EXECUTE A VALID TRUST

Under the Uniform Trust Code (UTC), the capacity necessary to execute a revocable trust is the same as that needed to execute a will.<sup>45</sup> This represents a change from some case law that *appeared* to apply a higher standard of capacity to trusts. At least, the cases used different language to describe the capacity needed and so it would seem that the courts may have been giving a signal that they were looking for a higher level of capacity.<sup>46</sup> For example, in a 1980 New Mexico case, the court described the capacity necessary to execute a valid trust in language similar to the *Restatement (Second) of Contracts* as "whether a person is capable of understanding in a reasonable manner, the nature and effect of the act in which the person is engaged."<sup>47</sup> When the actual facts of the cases are examined, however, the capacity standard found necessary to write a trust seems remarkably similar to that needed to execute a will. Although the court defined capacity similarly to a contractual standard, it went on to discuss the possibility of a lucid interval (a term usually reserved for testamentary capacity decisions) and compared the decedent's situation with a case dealing with testamentary capacity.<sup>48</sup>

The UTC declaration that the same level of capacity is necessary to execute a trust or a will comports with modern estate planning in which a trust is often a will substitute or a pour-over inter vivos or testamentary trust.<sup>49</sup> Given that the trust and the will are both part of the same estate plan, there is little reason to apply different standards of capacity. In an Arkansas case, the court specifically stated that because the trust was analogous to a will, it "draw[s] no distinction between the mental competency and free will necessary to execute either a will or a trust which takes effect, in part, at the date of death."<sup>50</sup>

Even if state law holds to a different standard, it is doubtful that in practice any court is going to come to a different outcome based on the differing standards. In short, if the trust settlor has enough capacity to execute a will, he or she almost surely

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44. See e.g., *Estate of Long*, 575 N.W.2d at 257; *Estate of Mask*, 703 So. 2d at 856; *Estate of Toler*, 886 So. 2d 76, 77 (Ala. 2004). However, the imposition of a guardianship may affect other powers of an individual that have a direct effect on how property of that individual is distributed at death. See e.g., *SunTrust Bank v. Harper*, 551 S.E.2d 419, 423 (Ga. 2000) (holding that the ward's attempt to change the beneficiary of his Individual Retirement Account, subsequent to the imposition of a guardianship, was void).

45. Unif. Trust Code § 601 & cmt. (2004).

46. See e.g., *In re Jones*, 401 N.E.2d 351 (Mass. 1979); *In re Estate of ACN*, 509 N.Y.S.2d 966 (N.Y. Sur. Ct. 1986).

47. *In re Estate of Head*, 615 P.2d 271, 274 (N.M. Ct. App. 1980).

48. *Id.*

49. See e.g., *Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982); *Georges v. Glick*, 856 F.2d 971 (7th Cir. 1988); Alan Newman, *Elder Law: The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 649 (2005).

50. *Noland v. Noland*, 956 S.W.2d 173, 175 (Ark. 1997).

has the capacity to create a valid trust. For example, in 1994, a Louisiana court stated that the decedent needed contractual capacity to make an effective trust amendment, but the court only considered the decedent's testamentary capacity before finding that she possessed the capacity to execute a valid will and the trust amendment.<sup>51</sup>

The only exception to a merger of capacity standards might occur when the trust acts as a conduit for an inter vivos gift. For example, the settlor, Myrna, creates an irrevocable trust funded with \$100,000 for the benefit of her two nieces, naming their mother, Monica, as trustee. The income is to be used for the educational needs of the nieces, with the principal to pass to the nieces ten years after Myrna's death. Here the settlor has made a completed gift but used a trust to affect the timing of its distribution.<sup>52</sup> Faced by a challenge to the trust by Myrna's brother, Mark, a court in a state with case law that uses different language to describe the capacity required to execute a trust might demand more capacity of Myrna than if she had merely signed a will that established a testamentary trust to accomplish a similar devise. That is, when an irrevocable trust is funded, two acts take place. First, the trust is created by a settlor who must have at least the capacity to write a will. Second, the settlor makes a gift to the irrevocable trust. To make the gift, the settlor, now acting as a donor, needs the capacity required to make a gift.

#### IV. CAPACITY TO MAKE A VALID GIFT OR THE EXECUTION OF A DEED

It is clear from case law that the capacity to make a gift is the same as the capacity to enter into a contract.<sup>53</sup> For example, an Illinois court held that "the test of a donor's mental capacity to make a gift is whether at the time of the transaction the donor had the ability to comprehend the nature and effect of his act."<sup>54</sup> The court considered evidence that the decedent suffered from an organic brain disorder and was confused and disoriented. The court also heard evidence that the decedent always recognized the beneficiary of the gift. Nevertheless, upholding a higher standard of capacity, the court concluded that the decedent could not have comprehended the nature and effect of his gift.<sup>55</sup> A federal court found that withdrawals from a decedent's bank account by her nephew could not be considered gifts, because the decedent, who had earlier been declared incompetent because of disorientation and general confusion, was not competent to contract, and therefore not competent to make a gift.<sup>56</sup>

A gift requires that the donor have the requisite intent. Thus, an individual must have sufficient mental capacity to form that intent. If the would-be donor lacks capacity, an essential element of a completed gift, intent is missing and so no gift can

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51. *Corley v. Munro*, 631 So. 2d 708 (La. Ct. App. 1994).

52. See e.g., *In re Estate of ACN*, 509 N.Y.S.2d 966 (N.Y. Sur. Ct. 1986); *In re Jones*, 401 N.E.2d at 351.

53. *Bettin v. Commissioner of Internal Revenue*, 543 F.2d 1269, 1271 (9th Cir. 1976); *Wyman v. Dunne*, 359 P.2d 1010, 1014-15 (Idaho 1961); *Hill v. Brooks*, 482 S.E.2d 816, 821 (Va. 1997).

54. *In re Estate of Clements*, 152 Ill. App. 3d 890, 894 (Ill. App. Ct. 1987).

55. *Id.*

56. *In re Bettin*, 543 F.2d at 1269.

occur.<sup>57</sup> The similarity between capacity for making a contract or a gift is based on the possible deleterious effect on the donor. The court in *Null's Estate* stated this succinctly, "[I]t requires more business judgment to make a gift than to make a will, as the former is immediately active while the latter is prospective. . . ."<sup>58</sup> Just as an incapacitated person, because of his or her lack of comprehension of the terms or consequences of the contract, may enter into an unfair or disadvantageous contract, so too may a donor unwittingly make gifts that he or she can ill afford to make.

Along the same lines, the standard of contractual capacity must be met for an individual to execute a valid deed. A North Carolina court stated:

The mental capacity required for the valid execution of a deed is the ability to understand the nature of the act in which the party is engaged and its scope and effect, or its nature and consequences—not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly. . . . A want of adequate mental capacity of itself vitiates the deed, while mere mental weakness or infirmity will not do so, if sufficient intelligence remains to understand the nature, scope, and effect of the act being performed.<sup>59</sup>

#### V. CAPACITY TO APPOINT AN AGENT UNDER A DURABLE POWER OF ATTORNEY

Case law consistently holds that a principal who appoints an agent under a power of attorney must have the capacity required to make a contract.<sup>60</sup> While a power of attorney is not a contract, it does commit the principal to a relationship that, like a contract and unlike a will, may have immediate impact upon the principal or at least can impact the principal during life.<sup>61</sup> In contrast, a will takes effect only at death, so it affects only potential beneficiaries, but has no financial effect on the testator.

A power of attorney can be amended or revoked as long as the principal has capacity. A durable power of attorney, however, can continue to affect the financial well-being of the principal after the principal has lost capacity. Prior to enabling statutes, a power of attorney was terminated upon the incapacity of the principal, but that safeguard has been eliminated so that the agent can continue to act (or, in the case

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57. Fellows, *supra* n. 41 at 621.

58. *Null's Estate*, 153 A. 137, 139 (Pa. 1930).

59. *Lamb v. Perry*, 86 S.E. 179, 183 (N.C. 1915).

60. See e.g., *In re Thames*, 544 S.E.2d 854 (S.C. Ct. App. 2001); *Testa v. Roberts*, 542 N.E.2d 654 (Ohio 1988); *Persinger v. Holst*, 639 N.W.2d 594 (Mich. Ct. App. 2001). The powers of attorney that are the subject of this section are powers of attorney for financial purposes, such as buying or selling the principal's property. Powers of attorney that appoint an agent to make health care decision for the principal are discussed in the next section.

61. *Persinger*, 639 N.W.2d at 597 (stating that "[requiring the] principal be mentally competent to consent to, render a degree of control over, and appreciate the significance and consequences of the resulting agency relationship is consonant with the purpose of a power of attorney.").

of a springing durable power of attorney,<sup>62</sup> begin to act) after the mental incapacity of the principal.<sup>63</sup> Of course, a will is not affected by the later incapacity of the testator, but then a will has no effect on the life or the financial well-being of the testator. Given the scope of authority granted to an agent under the power of attorney and the possibility that the principal may not have the capacity to revoke it, it is not surprising that the law requires a higher level of capacity to create a power of attorney. Furthermore, the “fiduciary relationship created by a durable power of attorney is like the relationship created by a trust. The fiduciary duty principles of trust law must, therefore, be applied to the relationship between a principal and her attorney-in-fact.”<sup>64</sup>

In a South Carolina case, citing lack of capacity, a daughter challenged her mother’s revocation of a durable power of attorney naming her as agent and execution of a new durable power of attorney naming her sister.<sup>65</sup> The court held that the creation of a durable power of attorney is the creation of an agency relationship and so requires contractual capacity to execute and revoke.<sup>66</sup> As such, the individual creating the durable power of attorney must “understand the nature, scope and the extent of the business she is about to transact.”<sup>67</sup> A Michigan court considered whether a durable power of attorney was valid and held that because of the purpose of a power of attorney and sound public policy, the creator of a durable power of attorney must have contractual capacity.<sup>68</sup> That is, the “primary purpose of a power of attorney is to evidence the delegation of authority to perform particular legal acts . . . as an appointed agent. . . . A fundamental requirement to such an agency relationship is that the parties to the agreement consent to its creation.”<sup>69</sup> Furthermore, allowing incapacitated individuals to create durable powers of attorney “would give license to those who have the power or inclination to coerce, cajole, or dupe such a person into effectively relinquishing rights to their property, finances, and other assets with minimal effort.”<sup>70</sup>

A principal who lacks the capacity to create a durable power of attorney also lacks the capacity to enter into a contract. Such an individual almost certainly meets the lack of capacity test needed to justify a formal declaration of incapacity and the possible appointment of a guardian or conservator.<sup>71</sup> Just as an individual under a

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62. A springing power of attorney is one that does not become immediately effective upon its execution but rather only becomes effective upon the happening of a specific event, such as a determination that the principal has become mentally incapacitated.

63. Am. Jur. 2D Agency § 26 (2004).

64. *Schock v. Nash*, 732 A.2d 217, 226 (Del. 1999).

65. *In re Thames*, 544 S.E.2d at 855.

66. *Id.* at 857.

67. *Id.*

68. *Persinger*, 639 N.W.2d at 594.

69. *Id.* at 597.

70. *Id.* at 598.

71. In some states, the appointment of a guardian or conservator automatically revokes any financial power of attorney that was put into place prior to the guardianship or conservatorship. See e.g., Ga. Ann. Code § 10–6–36 (2003).

guardianship cannot execute a valid contract, neither can that individual create a durable power of attorney, though he or she may have testamentary capacity. So the symmetry is complete. Individuals who lack the capacity to enter into a contract also lack the capacity to appoint an agent with the power to enter into a contract on their behalf.

## VI. CAPACITY TO EXECUTE A VALID ADVANCE HEALTH CARE DIRECTIVE

The law on advance health care directives is relatively new and largely statutory. For example, the New York law on health care proxies states that "every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person had been appointed for the agent. . . ."<sup>72</sup> The California code states that any "adult having capacity may execute a power of attorney for health care. . . ."<sup>73</sup> It defines capacity as "a person's ability to understand the nature and consequences of a decision and to make and communicate a decision. . . ."<sup>74</sup> New Jersey law allows any person who has not been adjudicated incompetent to execute an advance directive.<sup>75</sup>

The level of capacity necessary to execute a valid health care directive seems to be the same as or even lower than the level of capacity to execute a valid will. The reason for this may be that "the state will not intrude on an individual's autonomy with respect to medical decision-making, even where the individual is objectively delusional, because the action in question is self-regarding and, therefore, not an appropriate subject for state intervention."<sup>76</sup>

## VII. CAPACITY TO ENTER INTO A VALID CONTRACT

### A. Compared to Testamentary Capacity

As noted, the threshold required for a determination of capacity for testamentary purposes is relatively low. The sole question is whether the testator at one moment in time—the time of the execution of the will—had the ability to understand the consequences of a decision concerning the disposition of his or her property at death. The issue is not whether the disposition of assets was correct or rational, but only whether the testator had the mental capability to comprehend the factors that "normally" should affect such a decision, namely, what was given to whom.

In contrast, to enter into an enforceable contract:

The test of mental capacity to contract is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged . . . . [In order] to avoid a

72. N.Y. Pub. Health Law § 2981 (2005).

73. Cal. Prob. Code § 4671 (2005).

74. *Id.* at § 4609.

75. *In re Roche*, 687 A.2d 349, 353 (N.J. Super. Ct. 1996).

76. Knauer, *supra* n. 4, at 328.

contract it must appear not only that the party was of unsound mind or insane when it was made, but that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract.<sup>77</sup>

Recall that testamentary capacity does not include the more stringent requirement that the “person possesses sufficient mind to understand, in a reasonable manner,” which reflects the Anglo-American legal tradition of demanding a higher degree of capacity to enter into a valid contract.<sup>78</sup> The reasons for this are many, including the desire to encourage the execution of wills,<sup>79</sup> the greater importance of comprehension to contractual law,<sup>80</sup> and the historical fact that the law of contracts developed in courts of law<sup>81</sup> while the law of wills was created in courts of equity.<sup>82</sup> Yet the different standards of capacity also reflect two views of mental capacity, with the view of testamentary capacity more closely mirroring reality.

### *B. Contractual Capacity and the Voidability of Contracts*

Perhaps, the most compelling reason for the differing definitions is the difference in the default position; that is what happens if the court finds a will or a contract invalid because of a lack of capacity. If there is no will, the default position is the resurrection of a prior will or intestacy. Because the testator has died, there can be no return to the status quo. In contract law, however, the court can recreate the prior status quo by returning the parties to the legal position they had before entering into the contract. For example, David contracts to purchase a car. If the question of David’s incapacity is raised, there are two outcomes. One is to decide David lacked

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77. 17A C.J.S. *Contracts* § 143 (2005). See also N.Y. Pub. Health Law § 2981 (2005).

78. For discussions of testamentary capacity, see Gorman, *supra* n. 4; Knauer, *supra* n. 4; Daniel C. Marson, Justin S. Huthwaite & Katina Hebert, *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudential Therapy Perspective*, 28 Law & Psychol. Rev. 71 (2004); Frolik, *supra* n. 40. For discussions of contractual capacity see Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 Yale L. J. 271 (1944); Robert M. Brucken et al., *Mental Illness and Contracts*, 57 Mich. L. Rev. 1019 (1959); Wendy Chung Rossiter, *No Protection for the Elderly: The Inadequacy of the Capacity Doctrine in Avoiding Unfair Contracts Involving Seniors*, 78 OR. L. Rev. 807 (1999); Gregory E. Maggs, *Ipsa Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 Geo. Wash. L. Rev. 508 (1998); Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 Case W. Res. L. Rev. 307 (1989).

79. See *Goldberg*, 582 N.Y.S.2d at 620; *In re Will of Bossom*, 195 A.D. 339, 344 (N.Y. App. Div. 1921); *In re Will & Testament of Liebl*, 617 A.2d 266 (N.J. Super. Ct. 1992).

80. See *Goldberg*, 582 N.Y.S.2d at 620; *Nashville Elec. Supply Co., Inc.*, 533 S.W.2d 306, 308-09 (Tenn. Ct. App. 1975); *Allore v. Jewell*, 94 U.S. 506, 510-11 (1877); *Ortelere v. Teachers’ Retirement Board*, 250 N.E.2d 460, 464-65 (N.Y. Ct. 1969); *McPheters v. Hapke*, 497 P.2d 1045, 1046-47 (Idaho 1972).

81. See generally Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 Colum. L. Rev. 35 (1983); James C. Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield’s Trial Notes*, 76 Geo. L. J. 1949 (1988).

82. See generally Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. Rev. 527 (2000).

capacity and thus void the contract. The alternative is to decide that he had capacity and enforce the contract, with the result that David owns a car. If David had the necessary capacity at the time he entered into the contract, then all is well. Certainly a person with capacity should be held to his or her contracts. But if David lacked capacity, then all is not well. David is stuck with a car that he did not "want," if we define "want," as a desire arising from a mind that has capacity.

If capacity is a prerequisite for wants or desires, does that mean an incapacitated person cannot have wants or desires? It is nonsense to answer "yes." We know that they do. So why would David not be permitted to contract to buy a car that he wants even if he lacks capacity?

Apparently, the law supposes that the incapacitated David's wants are not worthy of legal support. Of course, that is not quite true, because in the majority of states a contract made by an incapacitated person is only voidable. That is, the contract will be enforced unless the incapacitated person or his or her guardian chooses to void the contract.<sup>83</sup> Therefore, since only the incapacitated person can void a contract, as long as David wants the car, though mentally incapacitated, in a majority of jurisdictions he can enforce the contract even if the seller would prefer to void the sale.

Though the majority rule is that contracts made by incapacitated individuals are voidable, the United States Supreme Court held in *Dexter v. Hall*<sup>84</sup> (which has never been overruled) that contracts with an incompetent person are totally void. Some states also maintain by statute or common law that contracts made by incompetent individuals are void.<sup>85</sup> The rationale behind many of the statutes and decisions voiding all contracts made by incapacitated persons is that no contract can be legally created with an incapacitated person, because there is no assent of two sound minds. Also, some may see the voiding of a contract as a matter of public policy. That is, completely voiding the agreement is the best means of giving protection to an incapacitated individual. Still, many states only make such contracts voidable, reflecting a more nuanced understanding that diminished mental capacity can be situational and variable over time so that an incapacitated person who makes a contract may later regain capacity and wish to affirm the contract.<sup>86</sup>

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83. *United States v. Manny*, 645 F.2d 163, 167 (2d Cir. 1981) (holding that a contract made by an incapacitated person is only voidable and may be ratified by the individual upon recovering his or her capacity.); 53 Am. Jur. 2D *Mentally Impaired Persons* § 166 (2004); *Williston On Contracts* § 10.5 (4th ed. 2004). Some states maintain that the contract of an individual judged insane is void, while the contract of an unadjudicated mentally incapacitated person is voidable. The *Restatement (Second) of Contracts* follows this view and states that an individual who is under guardianship due to an adjudication of incompetence cannot enter a valid contract. See Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 Tex. L. Rev. 554 (1943); 5 *Williston On Contracts* § 10.2 (4th ed. 2004); *Restatement (Second) of Contracts* § 13 (1981).

84. 82 U.S. 9 (1872).

85. Arkansas, Connecticut, Indiana, Minnesota, Montana, Oklahoma, South Carolina, South Dakota, West Virginia, and Wisconsin.

86. Many states maintain that the contract of an individual judged insane is void, while the contract of a nonadjudicated mentally incapacitated person is voidable. The *Restatement (Second) of Contracts* follows this view and states that an individual who is under guardianship due to an adjudication of



An election of the incapacitated person to void the contract recreates the status quo that prevailed prior to the agreement. Under the philosophy of Aristotle, the voiding of the contract would be the restoration of justice.<sup>87</sup> Or as Kant would have it, a return to equilibrium or balance,<sup>88</sup> which explains the preference in the law for voidable or void contracts. Since there was no meeting of the minds (one party lacked the capacity or, in contract terms, lacked a “mind”), there was no contract and the parties should be returned to their prior position.

### C. Contrasting Contract Law and Probate Law Views of Mental Capacity

Both the voidable or void rules of contract law incorporate a binary view of mental capacity. When faced with a dispute as to whether a contracting party has sufficient mental capacity, “yes” or “no” seem to be the only options. The contracting party either did or did not have the necessary degree of capacity. Some jurisdictions make the contracts of those who have been adjudicated incompetent (such as those with guardians) totally void, while making the contracts of those who have not been adjudicated incompetent merely voidable. The difference is difficult to justify, but it appears to be a recognition that, short of judicial adjudication of mental incapacity, it is difficult for a court to retrospectively gauge an individual’s mental capacity with any great certainty. Hence, to protect a party who is misjudged as being incapacitated, the law permits that party to enforce the contract. This seems to be a precaution against false findings of incapacity, but still reflects the view that the world is populated by individuals who either are or are not “incapacitated.” Yet in practice, many courts do not use a strictly psychiatric definition of capacity, but will look to the fairness of the contract. If the contract is fair, a person will more likely be found competent to enter into it.<sup>89</sup>

The lower standard of mental capacity required to execute a will proceeds from the idea that all people have the right to dispose of their property at death in any way

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incompetence cannot enter a valid contract. See Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 Tex. L. Rev. 554 (1943); 5 *Williston On Contracts* § 10.2 (4th ed. 2004); *Restatement (Second) of Contracts* § 13 (1981); 7-27 *Corbin On Contracts* § 27.10 (rev. ed. 2001). An incapacitated individual is granted the right to void a contract and return to the status quo as a means of reconciling the policies of security in contractual expectations and protection of individuals who are not able to protect themselves. Therefore, a person with mental capacity to understand and create a contract does not have the right to void it at his or her will because that right would undermine security in contracts. *Restatement (Second) of Contracts* § 15 cmt. a (1981).

87. Aristotle, *Nichomachean Ethics V* (stating that corrective justice is obtained by eliminating both the gain and the loss by the parties involved.). Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 Duke L. J. 277, 292 (1995). See James Gordley, *Mistake in Contract Formation*, 52 Am. J. Comp. L. 433, 443 (2004).
88. Emmanuel Kant, *The Metaphysical Elements of Justice* (1st ed. Konigsberg 1797). See Bailey Kunklin, *On the Knowing Inclusion of Unenforceable Contract Terms*, 56 U. Cin. L. Rev. 845, 855 (1988).
89. *Bach v. Hudson*, 596 S.W.2d 673 (Tex. App. Ct. 1980); 27-7 *Corbin On Contracts* § 27.10 (rev. ed 2001); *Williston On Contracts* § 10.3 (4th ed. 2004).

they see fit.<sup>90</sup> A low standard of capacity permits courts to "guard jealously the rights of all rational people, including the aged, the infirm, the forgetful and the queer, to make wills sufficient to withstand the attacks of those left out and those dissatisfied with the expressed desires of the departed. . . ."<sup>91</sup> Having a low standard of required capacity prevents wills from being declared void by the courts and so upholds the final wishes of the testator. A will is a unique legal act because it only becomes operative at the death of its creator. In contrast to a contract, which operates during the lifetime of the contracting parties, a testator must rely, not on the "kindness of strangers,"<sup>92</sup> but on the courts to see that his or her wishes are respected and enforced.

Moreover, "a will is not the product of a bilateral transaction between putative antagonists and does not require the sharpness of mind of persons involved in a business transaction."<sup>93</sup> The effect of a will is only indirect on third parties. "At most, a disappointed heir can complain of a lost expectancy for which no consideration has changed hands."<sup>94</sup> In contrast, a contract has a direct effect on third parties because "the legitimate investment-backed expectations . . . are at stake . . . ."<sup>95</sup>

A higher standard for testamentary capacity would mean more invalidated wills. And while the high contract test of capacity means more invalid contracts, the cost is low since the parties can return to the prior status quo. But that is impossible when a will is invalidated.<sup>96</sup> That is, once the testator has died, the property must be distributed in some method, if not by will, then by a prior will or by intestate succession. Thus, requiring a lower standard of capacity for wills protects the testator's intent and makes resorting to a prior will that the testator wanted to revoke or to intestate succession a less frequent occurrence. In contrast, the higher standard of capacity for contracts safeguards individuals who cannot protect themselves from unfair contracts while minimizing the injury to the parties with whom they are contracting, whose only "loss" is the benefit of the bargain, but who otherwise are made whole.

An individual under a plenary guardianship or guardianship of the estate cannot enter into a valid contract, but may still be able to execute a valid will.<sup>97</sup> The rationale is that prohibiting the ward from making contracts protects the ward's property, but the execution of a will has no present effect on the financial well-being of the ward because it does not take effect until after the death of the ward. "The court in appointing a guardian for him merely has before it the question of whether he is

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90. *Burke*, 801 S.W.2d at 693.

91. *Kentucky Trust Co. v. Gore*, 192 S.W.2d 749, 752-53 (Ky. Ct. App. 1946).

92. *Tennessee Williams, A Streetcar Named Desire* (Signet Printing 1951).

93. *Goldberg*, 582 N.Y.S.2d at 620.

94. *Knauer, supra* n. 4, at 329.

95. *Id.*

96. *See generally, id.; In re Bossom*, 195 A.D. at 343.

97. *Restatement (Second) of Contracts* § 13 (1981) (stating, "A person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect."). *See also* 1 Tenn. Juris. *Mentally Ill and Other Incompetents* § 13 (2004); Cal. Civ. Code § 40 (Deering 2005); GA. Code Ann. § 13-3-24 (2004).

competent to manage his property during his lifetime, not whether he is competent to direct how it shall be disposed of after his death.”<sup>98</sup>

### VIII. TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

#### A. *The Doctrine of Undue Influence*

Unlike contract law, probate law recognizes the concept that capacity is not a “yes/no” paradigm, but rather capacity is better thought of as situational and varying in degree. At one end of the spectrum are individuals who have “complete capacity” and on the other end are individuals in a coma. In between are individuals with greater or lesser degrees of capacity. Saying that capacity is “situational” means that capacity cannot be merely measured on a scale from 0 to 100 because individuals may lack capacity for different tasks. Rather than determining that Jack has a capacity of 65 and Jill 75, the law of probate (and modern guardianship) determines that Jack can perform tasks A and B but not C, while Jill can perform A and C but not B.

The concept of diminished and situational capacity also plays an important role when there are allegations of undue influence, because it is difficult to convince a judge or jury that an individual with “normal” capacity could be the victim of undue influence. Undue influence occurs when the testator’s freedom of choice is so dominated or overridden by the desires of another that the will of the testator reflects not the testator’s desires but rather those of the other individual. Circumstantial evidence that may lead to a finding of undue influence includes whether “(1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had a disposition to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence.”<sup>99</sup> The existence of a confidential relationship between the testator and the alleged “influencer” also raises the specter of undue influence.<sup>100</sup> A confidential relationship may exist when one individual, who is otherwise competent to transact his or her own business, reposes special trust in or reliance on the judgment of another.<sup>101</sup> Alternatively, a confidential relationship may exist when one individual psychologically dominates another who is of frail or feeble mind.<sup>102</sup>

In the case of diminished capacity allegations within the context of undue influence, probate law demonstrates a fairly sophisticated understanding of the human mind. When a court overturns an otherwise valid will under the doctrine of undue influence, it is applying a doctrine that reflects the common sense belief that an individual with diminished, but legally sufficient, testamentary capacity can be induced to write a will that in some fundamental way does not reflect the core wants of

98. Green, *supra* n. 83, at 585-86.

99. *Restatement (Third) of Property: Wills & Donative Transfers* § 8.3 cmt. e (2003).

100. *Restatement (Third) of Property: Wills & Donative Transfers* § 8.3 cmt. g (2003).

101. *Id.* A confidential relationship may also exist as a matter of law between an individual and a professional, such as the attorney-client or doctor-patient relationship.

102. *Id.*

that individual.<sup>103</sup> That is, the influencer is able to overpower the actual desires of the testator, and, in most cases, make the testator believe that his or her desire is the same as that of the influencer.<sup>104</sup>

Psychologists, doctors, and lawyers alike have all theorized how overpowering the desire of the testator takes place. The controlling theory is that the testator becomes analogous to a cult member.<sup>105</sup> Usually, six factors exist that are helpful in understanding how influencers dominate over the testators: isolation, siege mentality, dependence, a sense of powerlessness, fears of abandonment, and unawareness of the real world.<sup>106</sup>

Through isolation and subterfuge, the influencer is able to take control of the testator's life. As the testator grows more dependent upon the influencer, the influencer gains the ability to dominate the testator, and that domination increases as the testator's capacity decreases.<sup>107</sup> Yet, while the testator falls under the spell of the influencer, the testator has sufficient capacity to write a will or execute a contract.

### *B. Undue Influence and Diminished Capacity*

The doctrine of undue influence rests on the notion that individuals with diminished mental capacity are susceptible to being tricked by unscrupulous individuals.<sup>108</sup> Elderly individuals with failing memories, dementia, and confusion are more easily duped. Therefore, the doctrine developed to protect individuals "short of total incapacity against improper persuasion by others in positions of authority, control, trust, familial relation, or the like, who [have] the means and opportunity to exercise improper persuasion."<sup>109</sup>

Courts pay particular attention to the vulnerability of the testator when deciding if the will was the product of undue influence. For example, in a Montana case, the court considered the physical and mental condition of the testator, through testimony of doctors and other witnesses.<sup>110</sup> Due to his weakened state of mind and body, the court held that he was very susceptible to influence, and that the will was a product of his diminished capacity and suggestion by his children, rather than his own desire.<sup>111</sup> As noted by an Arkansas court, the level of proof needed for an undue influence claim is on a sliding scale based on the testator's vulnerability.<sup>112</sup> That is, "the facts constituting the undue influence are required to be far stronger in the case of a testator

103. *Hardee v. Hardee*, 309 S.E.2d 243, 245 (N.C. 1983).

104. See generally Mary Joy Quinn, *Undoing Undue Influence*, 12 J. Elder Abuse & Neglect 9 (2000).

105. *Id.*

106. Margaret Thaler Singer, *Undue Influence and Written Documents: Psychological Aspects*, 10 Cultic Stud. J. (1993), available at <http://www.csj.org/pub>.

107. *Id.*

108. Abraham Nievod, *Undue Influence in Contract and Probate Law*, 10 Cultic Stud. J. 1 (1993), available at <http://www.csj.org/pub>.

109. *Id.*

110. *In re Aageson*, 702 P.2d at 342.

111. *Id.* at 343.

112. *Dunklin v. Black*, 275 S.W.2d 447 (Ark. 1955).

whose mind is strong and alert than in the case of one whose mind is defective or impaired by disease or advancing age. On the other hand less evidence is required to establish undue influence where the disposition of the testator's effects is unaccountably unnatural."<sup>113</sup> Consequently, courts consider the susceptibility of the testator, including his or her "age, the lack of independent advice in preparing the will, the testator's illiteracy or blindness . . . the testator being in an emotionally distraught state . . . and fraud or duress directed toward the testator."<sup>114</sup>

This is not the place to undertake an extended examination and defense of the doctrine of undue influence. It is enough to note that its existence requires the law to observe that capacity is not "yes or no," but is a continuum. And on that continuum, some individuals suffer from reduced or diminished capacity. By acknowledging that individuals have varying degrees of capacity, probate law comports more with the actual world and not the world as described in contract law. That is, capacity varies across a range and is situational. That someone with diminished capacity has enough capacity to execute a valid will, but not quite enough capacity to ward off undue influence, indicates that the doctrine of undue influence reflects a fairly sophisticated understanding of the human mind.<sup>115</sup>

When courts assess the testamentary capacity of an individual, the standard of capacity appears to vary with the facts and circumstances, such as the complexity of the proposed estate plan. The undue influence doctrine is even more expressive of the idea that capacity is variable and situational. That is, if the evidence pointing to the other factors are strongly present, a testator may have a high degree capacity and the will may still be declared void.<sup>116</sup>

Commentators who have examined the cases have concluded that often it is the distribution scheme that triggers the judicial invocation of the doctrine.<sup>117</sup> Of course, an "unnatural gift" is not irrefutable evidence of the acts of an individual with diminished capacity and a victim of undue influence. Indeed, even fully capacitated, non-influenced persons do occasionally create wills with unusual distribution patterns. But such a distribution scheme is probative evidence of the possibility of undue influence; for in the end, mental capacity is best demonstrated by choices, not clinical diagnosis. Yes, rational people have the right to make irrational choices, but how often do they do that? And when the question is whether a testamentary gift should be respected, and clinical tests on the now-deceased person cannot be performed, the law turns to common sense evaluations of the testator's acts.<sup>118</sup>

In many instances, it is not at all clear what distinguishes "undue" influence from acceptable influence, such as kindness, compassion, thoughtfulness or friendliness.

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113. *Id.* at 449 (internal citations omitted).

114. *Mitchell v. Smith*, 779 S.W.2d 384, 388 (Tenn. Ct. App. 1989).

115. *See* Frolik, *supra* n. 9.

116. *Dunklin*, 275 S.W.2d at 447.

117. *See* Frolik, *supra* n. 9.

118. *See Holm v. Superior Court*, 187 Cal. App. 3d 1241 (Cal. Ct. App. 1986) (holding that a body could not be exhumed to prove incapacity due to an organic brain disorder and, in effect, that contestants must rely on common sense evidence of incapacity.).

That is where the requirement of the proof of the elements of undue influence comes into play as well as the lay determination by a judge or a jury as to what happened. Indeed, a finding of undue influence allows the fact finder some wiggle room, the flexibility to admit the loss of mental capacity without conceding that the outcome of the dispute rests on a black or white capacity determination as it does in a contract dispute. Instead, the fact finder can bring the presence or absence of the elements of undue influence into the discussion to resolve the matter. When afforded the choice of finding a lack of testamentary capacity or undue influence, the courts often chose the latter. By affirming that the testator had the requisite capacity, but was unduly influenced, courts avoid addressing the issue of the level of capacity required to write a valid will.<sup>119</sup>

### *C. Undue Influence Supports the Low Level Required for Testamentary Capacity*

The doctrine of undue influence permits the courts to create a third category between testamentary capacity and incapacity—a level of capacity that is sufficient for some, but not all, acts. This in turn is a response to the reality that at death, the property must go somewhere. And though intestacy laws attempt to create a just distribution scheme, the distribution will not reflect the wishes of the decedent. Therefore, the law favors testation because it promotes autonomy and gives the decedent the ultimate decision.

The law accepts a liberal capacity standard for testation in the belief that in most instances it is better to honor the preferences of the testator, even if he or she has significantly diminished capacity, because it is better to err on the side of the expressed wishes of the testator. The low level of mental capacity needed to execute a will is backstopped by the doctrine of undue influence, which permits courts to protect testators with low capacity.

The required legal mental capacity needed for any particular act is ultimately set at a level required to support other societal imperatives. Consequently legal tests of mental capacity gain their legitimacy from the common law tradition that permits judges to create law that responds to social and economic realities. The justification and explanation of testamentary capacity “has not been logic, it has been experience.”<sup>120</sup>

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119. Frolik, *supra* n. 9, at 841.

120. Oliver Wendell Holmes, Jr., *The Common Law* 1 (1880) (stating, “The life of the law has not been logic, it has been experience.”).